

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
Lotus Communications Corporation

ORDER

Adopted: June 9, 2008

Released: June 9, 2008

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. By this Order, we dismiss a Petition for Reconsideration filed by Lotus Communications Corporation ("Lotus"). Lotus requests that we reconsider and set aside a letter released by the Auctions and Spectrum Access Division ("Division") on January 26, 2006, in which the Division notified Lotus that it appeared to be in violation of the Commission's competitive bidding anti-collusion rule. Lotus also requests that we reconsider and set aside the listing of the Division Letter in the Commission's Daily Digest. Lotus argues that the Wireless Telecommunications Bureau ("Bureau") erroneously concluded that Lotus apparently violated the Commission's anti-collusion rule. Lotus further contends that in so doing the Bureau improperly imposed sanctions on Lotus without providing it with notice or an opportunity to be heard. As explained below, we conclude that Lotus's Petition for Reconsideration is barred under the Commission's rules because the Division Letter was not a final action subject to reconsideration.

II. BACKGROUND

2. Under Section 1.2105(c) of the Commission's rules (the "anti-collusion rule"), all auction applicants that apply to bid on licenses or permits in any of the same geographic areas are prohibited from discussing with each other, or disclosing to each other in any manner, the substance of their bids or bidding strategies during the auction process, unless such applicants disclose on their short-form applications that they are members of a bidding consortium or other joint bidding arrangement. This prohibition applies from the deadline for filing FCC Form 175 short-form applications through the deadline for submitting down payments. The prohibition applies to all entities that file short-form

1 Lotus Communications Corporation, Petition for Reconsideration, filed Feb. 27, 2006 ("Petition").

2 Letter from Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Howard A. Kalmenson, President, Lotus Communications Corporation, and Jerome S. Boros, Counsel for Lotus Communications Corporation, 21 FCC Rcd 520 (2006) ("Division Letter").

3 Federal Communications Commission, Daily Digest, January 26, 2006.

4 Section 1.2105(c)(1) states in pertinent part: "[A]fter the short-form application filing deadline, all applicants for licenses in any of the same geographic license areas are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements, until after the down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to § 1.2105(a)(2)(viii)." 47 C.F.R. § 1.2105(c)(1). Section 1.2105(a)(2)(viii) states that the short-form application must contain "[a]n exhibit, certified (continued....)

applications to participate in an auction regardless of whether such applicants become qualified bidders or actually bid.<sup>5</sup> Section 1.2105(c)(7)(i) provides that, for purposes of the anti-collusion rule, the term “applicant” includes all controlling interests in an entity submitting a short-form application and all officers and directors of the entity.<sup>6</sup>

3. Lotus filed a short-form application to participate in Auction 62, an auction of 171 FM broadcast construction permits that began on January 12, 2006, and concluded on January 31, 2006.<sup>7</sup> Aurora Communications Inc. (“Aurora”) also filed a short-form application to participate in Auction 62.<sup>8</sup> Lotus applied to bid on four permits in the auction, and Aurora applied to bid on all 171 permits being offered. Thus, Lotus and Aurora applied to bid on four permits in the same geographic areas and were therefore prohibited from discussing with or disclosing to each other the substance of their bids or bidding strategies from the Auction 62 short-form application deadline through the down payment deadline, unless they disclosed on their short-form applications that they had entered into a joint bidding arrangement.

4. Neither Lotus nor Aurora disclosed the existence of any bidding agreements or arrangements in its short-form application, and each certified in its short-form application that it had not entered into any agreements or understandings with any undisclosed parties. However, Aurora’s short-form application indicated the existence of an individual who was an officer of both Lotus and Aurora. Specifically, Aurora’s short-form application identified Mr. Lynden Williams as Aurora’s vice president and the holder of 50 percent of Aurora’s issued and outstanding voting stock and also identified Mr. Williams as senior vice president of Lotus. Lotus’s short-form application identified Mr. Williams as one of Lotus’s authorized bidders.

5. Because Mr. Williams was an officer of both Lotus and Aurora, under Section 1.2105(c)(7)(i) he was an applicant with respect to both Lotus’s and Aurora’s applications to participate in Auction 62. The Division therefore determined that Lotus and Aurora were required to identify each other on their short-form applications as parties with which they had a bidding arrangement or understanding and that, because they had not done so, their short-form applications were incomplete. On November 8, 2005, the Division sent separate letters to Lotus and Aurora notifying them of this deficiency in their applications. Pursuant to Section 1.2105(b)(2) of the Commission’s rules, the Division

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as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.” 47 C.F.R.

§ 1.2105(a)(2)(viii). Section 1.2105(a)(2)(ix) further requires auction applicants to certify on their short-form applications that they have not entered into any agreements or understandings with any other parties regarding the amount of their bids, their bidding strategies, or the particular licenses on which they will or will not bid, except those parties identified in their applications. 47 C.F.R. § 1.2105(a)(2)(ix).

<sup>5</sup> See, e.g., Application of Star Wireless, LLC, *Forfeiture Order*, 19 FCC Rcd 18,626, 18,628 ¶ 4 (Enf. Bur. 2004), upheld on review, *Star Wireless, LLC and Northeast Communications of Wisconsin, Inc., Order on Review*, 22 FCC Rcd 8943 (2007), affirmed *Star Wireless, LLC v. FCC*, 522 F.3d 469 (D.C. Cir. 2008); Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Robert Pettit, Counsel for Noverr Publishing, Inc., 16 FCC Rcd 10,080, 10,081 (WTB/AIAD 2000).

<sup>6</sup> 47 C.F.R. § 1.2105(c)(7)(i).

<sup>7</sup> Lotus Communications Corporation, FCC Form 175, filed Aug. 12, 2005. See also Auction of FM Broadcast Construction Permits, Status of FCC Form 175 Applications to Participate in Auction No. 62, *Public Notice*, 20 FCC Rcd 17,827, 17,882 Attachment B (WTB/MB 2005) (“*Auction 62 Status Public Notice*”). Short-form applications of all Auction 62 applicants may be viewed online at <https://auctionfiling.fcc.gov/form175/search175/index.htm>.

<sup>8</sup> Aurora Communications Inc., FCC Form 175, filed Aug. 12, 2005. See also *Auction 62 Status Public Notice*, 20 FCC Rcd at 17,882 Attachment B.

provided Lotus and Aurora with an opportunity to cure the deficiencies in their applications and resubmit the applications by December 2, 2005.<sup>9</sup> Lotus made no changes to its short-form application, it did not submit an upfront payment as required under the Commission's rules to participate in Auction 62, and it was found unqualified to participate in the auction.<sup>10</sup>

6. Under Section 1.2105(c)(1), Lotus nevertheless remained subject to the anti-collusion rule until the post-auction down payment deadline. On January 26, 2006, the Division notified both Lotus and Aurora that, because they had disclosed no agreement with each other in their short-form applications, and because they had applied to bid on several of the same construction permits in Auction 62, they appeared to be in violation of the anti-collusion rule.<sup>11</sup>

7. In its Petition, Lotus claims that the Division Letter and the listing of the letter in the Commission's Daily Digest constitute sanctions against Lotus.<sup>12</sup> Lotus also asserts that the Bureau imposed these "sanctions" without providing notice to Lotus, without giving it an opportunity to be heard, and without explaining the reason for the sanctions or the use of the term "apparent violation."<sup>13</sup> According to Lotus, it did nothing wrong in connection with Auction 62 because it was unaware that Mr. Williams and another Lotus employee had filed a separate application to participate in Auction 62 until it received the Division's letter of November 8, 2005. Lotus states that at that point it abandoned its application by deciding not to submit an upfront payment.<sup>14</sup> Lotus further asserts that Lotus had not yet formulated a bidding strategy for Auction 62 when it received the Division's letter of November 8, 2005; that its president, Mr. Howard A. Kalmenson, makes all such decisions for the company; and that the Bureau should not presume that the company's bidding strategy is necessarily shared with other officers of the company.<sup>15</sup> Finally, Lotus claims that the company, Mr. Kalmenson, and its employees have been unjustifiably stigmatized by the Bureau's actions.<sup>16</sup>

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<sup>9</sup> Letter from Kathryn M. Garland, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Jerome S. Boros, Counsel for Lotus Communications Corp., dated Nov. 8, 2005; Letter from Kathryn M. Garland, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to John Cooper, President, Aurora Communications Inc., dated Nov. 8, 2005. *See also* 47 C.F.R. § 1.2105(b)(2). Consistent with usual practice, Division staff also spoke with Lotus's and Aurora's designated contacts concerning the application deficiencies during the period for resubmitting incomplete and deficient applications.

<sup>10</sup> *See* "Auction of FM Broadcast Construction Permits; 212 Bidders Qualified to Participate in Auction No. 62," 20 FCC Rcd 19,937, 19,996 Attachment C (WTB/MB 2005) ("*Auction 62 Qualified Bidders Public Notice*"). Aurora submitted an amendment to its short-form application during the resubmission period. In its submission, Aurora confirmed Mr. Williams's position as senior vice president of Lotus. Aurora further stated that "Lotus has removed Lynden Williams as an authorized bidder." Aurora Communications Inc., Amendment to FCC Form 175, filed Nov. 28, 2005. Aurora also requested that the four permits that both it and Lotus had applied to bid on be removed from its application. *Id.* However, changes in the license areas selected on a short-form application are considered major amendments and are not permitted after the short-form filing deadline. 47 C.F.R. § 1.2105(b)(2). Aurora did not submit an upfront payment and was found unqualified to participate in the bidding. *See Auction 62 Qualified Bidders Public Notice*, 20 FCC Rcd at 19,996 Attachment C.

<sup>11</sup> Division Letter, *supra* note 2.

<sup>12</sup> Petition at 1

<sup>13</sup> *Id.* at 2, 4.

<sup>14</sup> *Id.* at 2, 4-5.

<sup>15</sup> *Id.* at 5-7, Exhibit 1.

<sup>16</sup> *Id.* at 2.

### III. DISCUSSION

8. Under Section 1.106(a)(1) of the Commission's Rules, a petition for reconsideration will lie only against a "final action," taken either by the Commission or on delegated authority.<sup>17</sup> The Division's letter of January 26, 2006, was not a final action. The Division stated that, based on the information provided in Lotus's and Aurora's short-form applications for Auction 62, Lotus appeared to be violation of the anti-collusion rule. The Division did not, however, make a final determination that Lotus had violated the Commission's rules. Therefore, the Division Letter is not subject to reconsideration.

9. Lotus claims that the Division Letter and the listing of the letter in the Commission's Daily Digest constitute sanctions.<sup>18</sup> We disagree. Parties that are found to have violated the anti-collusion rule may be sanctioned in a variety of ways: they may, for example, be subject to forfeitures and may be prohibited from participating in future auctions.<sup>19</sup> The Division, however, imposed no sanctions of any kind on Lotus. Furthermore, the Commission's listing of the Division Letter in the Daily Digest, a routine practice the agency uses to inform the public of its issuance of various types of documents, is not a sanction.

10. Prior to imposing a forfeiture for a violation of its rules, the Commission issues a notice of apparent liability. Such a notice explains the act or omission a party is charged with, sets the amount of the forfeiture for which it is apparently liable, and provides it with an opportunity to show, in writing, why the forfeiture should be reduced or not imposed at all.<sup>20</sup> Notices of apparent liability are not final actions that are subject to petitions for reconsideration.<sup>21</sup> Given that the Division's letter of January 26, 2006, did not formally charge Lotus with a violation of the Commission's rules and contained no notice of any possible sanctions against Lotus, it stands to reason that it too is not a final action subject to reconsideration.

11. Although we dismiss Lotus's Petition on procedural grounds, we take this opportunity to respond to certain of Lotus's arguments in order to assist future auction applicants. First, the Division acted properly in notifying Lotus that it appeared to be in violation of the anti-collusion rule. Enforcement of the anti-collusion rule is critical to ensuring that Commission auctions are fair to all participants, that the auction process is competitive, and that public confidence in the integrity of the process is maintained.<sup>22</sup> When applicants for an auction submit information in their short-form applications that indicates they are in violation of the rule, as was the case here, it is very important that the Bureau notify the applicants of the apparent violation so that the fairness and competitiveness of the auction will not be jeopardized.

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<sup>17</sup> 47 C.F.R. § 1.106(a)(1). See also *Peninsula Communications, Inc., Forfeiture Order*, 17 FCC Rcd 2832, 2832 ¶ 1 n.3 (2002) ("*Peninsula*").

<sup>18</sup> Petition at 1.

<sup>19</sup> See, e.g., 47 C.F.R. § 1.2109(d); Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 466 ¶ 161 (1998); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2388 ¶ 226 (1994); Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 62, *Public Notice*, 20 FCC Rcd 10492, 10499 (WTB/MB 2005); Wireless Telecommunications Bureau Reminder of Anti-Collusion Rule Obligations, *Public Notice*, 19 FCC Rcd 22,880, 22,881 (WTB 2004).

<sup>20</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

<sup>21</sup> *Peninsula*, 17 FCC Rcd at 2832 ¶ 1 n.3.

<sup>22</sup> See, e.g., Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Seventh Report and Order*, 16 FCC Rcd 17,546, 17,546-47 ¶ 2 (2001).

12. Second, the Division fully explained the nature of Lotus's apparent violation of the anti-collusion rule. The Division reviewed all of the pertinent facts and explained in detail that officers and directors of entities that file short-form applications to participate in auctions are applicants for purposes of the anti-collusion rule, that Aurora's short-form application identified Mr. Williams as an officer of both Lotus and Aurora, that Mr. Williams was therefore an applicant with respect to both the Lotus and Aurora applications, and that in these circumstances the bidding strategies of the two entities are presumed to be conveyed to each other in violation of the rule unless the two entities identify each other on their short-form applications as parties to an agreement. Moreover, the Division clearly referenced the Commission's relevant rules and precedent.

13. Third, we reject Lotus's argument that the Bureau should not presume that its president necessarily shares the company's bidding strategy with other officers of the company. The presumption that the officers of a company are privy to its bidding strategy is grounded in Section 1.2105(c)(7)(i) and is entirely reasonable. Although there may be situations in which an individual officer of a particular company does not know its bidding strategy, the Bureau cannot be aware of such individual situations, nor may it refrain from notifying the company of an apparent rule violation based on the theoretical possibility that a common officer of two companies does not have access to both of their bidding strategies. Similarly, the Bureau cannot be aware of when a company formulates its bidding strategy. The Bureau must presume under the Commission's rules that bidding strategies are formulated as of the short-form application deadline and that information is shared among officers of a company.<sup>23</sup>

14. Fourth, to the extent Lotus, its president, or any of its employees has suffered any injury in this case, the injury was not caused by the Division, which properly notified Lotus that it appeared to be in violation of the Commission's rules.<sup>24</sup> If Lotus's president was unaware that Mr. Williams and another Lotus employee had filed a separate application to participate in Auction 62 prior to the Division's letter of November 8, 2005, this was a matter between Lotus's president and Mr. Williams and the other Lotus employee.<sup>25</sup>

15. Finally, we note that neither Lotus nor Aurora participated in Auction 62, and the Bureau did not pursue the instant matter by conducting an investigation or by imposing sanctions or issuing a notice of apparent liability against either party. In dismissing Lotus's Petition, we therefore consider this matter closed.

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<sup>23</sup> Lotus cites the Bureau's statement in *David L. Nace* indicating that the enforcement of the anti-collusion rule will turn on a full examination of the facts of each particular case. Petition at 7 (citing Letter from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, to David L. Nace, Lukas, McGowan, Nace & Gutierrez, 11 FCC Rcd 11,363, 11,364-65 (1996) ("*David L. Nace*"). The Bureau's statement remains accurate today. However, as we have made clear, the Bureau has taken no enforcement action against Lotus. Had the Bureau initiated an enforcement action in this case, by, for example, issuing a notice of apparent liability, Lotus would have had an opportunity to explain its individual circumstances.

<sup>24</sup> The Division and the Video Division of the Media Bureau had issued a similar letter a few months earlier. Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, and Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Colby M. May, TCCSA, Inc., d/b/a Trinity Broadcasting Network, 20 FCC Rcd 14,648 (2005) (finding apparent violation of anti-collusion rule where applicants for the same construction permits shared an officer and director and applicants had not identified one another on short-form applications).

<sup>25</sup> Lotus appears to recognize this in asserting that "Lotus and its employees should not be stigmatized by reason of the misguided actions of two employees. . . ." Petition at 7.

**IV. CONCLUSION**

16. As explained above, we conclude that Lotus's Petition for Reconsideration is barred under Section 1.106(a)(1) of the Commission's Rules. Under this rule, only final actions are subject to reconsideration. The Division's letter of January 26, 2006, was not a final action. Lotus's Petition for Reconsideration therefore must be dismissed.

**V. ORDERING CLAUSE**

17. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Petition for Reconsideration filed by Lotus Communications Corporation on February 27, 2006, is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting  
Deputy Chief, Wireless Telecommunications Bureau